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FEDERAL COMMUNICATIONS COMMISSION
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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

IN THE MATTER OF TELEPHONE COMPANY-CABLE TELEVISION CROSS-OWNERSHIP RULES, SECTIONS 63.54-63.58	)	CC DOCKET NO. 87-266
AND	)	DOCKET FILE COPY ORIGINAL
AMENDMENTS OF PARTS 32, 36, 61, 64, AND 69 OF THE COMMISSION'S RULES TO ESTABLISH AND IMPLEMENT REGULATORY PROCEDURES FOR VIDEO DIALTONE SERVICE	)	RM-8221

INITIAL COMMENTS OF SOUTHWESTERN BELL CORPORATION

ROBERT M. LYNCH
PAULA J. FULKS

175 E. HOUSTON
ROOM 1212
SAN ANTONIO, TX 78217
(210) 351-3424

ATTORNEYS FOR
SOUTHWESTERN BELL CORPORATION

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SUMMARY

SBC views this proceeding as an opportunity for the FCC to reaffirm the truth which this Commission recognized three years ago: The public interest supports the provision of cable services by local exchange companies (LECs) in order to promote diversity in video programming. SBC submits that the FCC has been given no choice by the courts but to acknowledge that LECs have a constitutional right to speak as cable operators.

It follows directly from this constitutional right that the FCC cannot adopt its tentative decision to limit LEC provision of video programming to that transmitted over video dialtone platforms. Because the statute which banned LECs from becoming cable operators has been declared unconstitutional on its face, any FCC rule which forbids LECs from becoming cable operators will also be unconstitutional.

Nor can the FCC condition LEC provision of video programming upon the construction and use of a VDT network. The essence of the now-obsolete VDT framework is that the transport of video signals is segregated from the content of the signals and that the transport element must be provided as a common carrier service. The FCC is forbidden, however, from mandating that any particular company service offering be provided indifferently to the public. The carrier has the right in the first instance to choose whether to offer a service indiscriminately, to a selected few or only to one customer. The decision of whether a service is a common carrier offering or not comes after the company chooses its targeted customer(s), not before. Because the FCC cannot compel a company to offer a common carrier service, it cannot condition that

company's constitutional right to speak on the company's offer of a service it does not wish to provide.

The authority of Section 214 of the Communications Act does not change this analysis. That section applies only to the activities of carriers. Indeed, the FCC is without authority to apply Section 214 to the construction of cable facilities by any company, including those which also provide telephony. The FCC cannot use the fact that telephone companies are required by Section 214 to request permission to construct common carrier facilities to support a like requirement for non-common carrier (i.e., cable) facilities as a condition of a telephone company exercising its constitutional right. Similarly, the FCC cannot limit a telephone company's relationship with cable companies in the telephone company's serving territory to the carrier-user relationship, provision of enhanced services and lease of cable drop wires.

The Commission's specific application of Section 214 to the construction of cable facilities by companies that also offer telephony poses other serious constitutional issues. For example, the FCC suggests that it may limit a LEC's use of the VDT capacity by applying conditions to the Section 214 Application approval. If another programmer (or group) does not use the remaining capacity, however, the company's investment will sit idle and the investment will be wasted, without any assurance that recovery will be permitted. Confiscation and eminent domain principles counsel against such a rule. Similar concerns can be voiced about the Commission's determination to limit "anchor" programmers.

Having created VDT, and faced with judicial decisions that permit telephone companies to provide programming over that network, the Commission struggles in this proceeding to understand what additional regulations should be applied to these video programming operations. SBC submits that the law is clear: If a company is in the VDT business, the VDT provider is subject to Title II regulation, but its programmer-customers are free from any regulation. Neither a VDT operator nor its programmer-customers are cable operators nor do any of them control a cable system. This decision, which the FCC reached before telephone companies won the freedom to be programmers, does not change just because the programmer is affiliated with (or coincident with) the VDT operator. Moreover, no special challenges are posed by this new situation which would lead the FCC to impose additional or new conditions. Rather, the Commission's existing safeguards, including the affiliate transactions rules, adequately protect against any potential problems.

If, on the other hand, a company decides to become a cable operator and not to provide VDT service, the law is equally clear that only Title VI and not Title II regulation will apply. Title VI regulation is exclusive of any common carrier regulation and the Act specifically forbids imposition of common carrier regulation on any company's cable operations. Therefore, the FCC is without authority to impose any aspect of Title II on a telephone company's cable operations, whether conducted within the telephone company or by an affiliate.

It follows, then, that the FCC should not impose any restrictions on LEC joint marketing with an affiliated video services provider. Title VI contains no such provision, so it cannot be imposed on a telephone company's cable operation, while video programming on a VDT operation needs no additional safeguards. Under no circumstance should the FCC require structural separation.

Mixing Title II and Title VI regulation for application to the same operation also would be imprudent. Title II applies to common carrier operations, which are indifferent to content; Title VI applies to cable operations, in which content control is vital. Moreover, mixing the two would produce inconsistent and confusing results, which would slow the increase in competition which the FCC seeks to spur. Keeping the two models separate and independent is the best alternative. It is particularly inconsistent with the dual model approach to impose more stringent affiliation standards upon LECs involved in VDT than upon the other LEC affiliations, and SBC therefore urges the FCC not to adopt the 5 percent ownership test for affiliation in the VDT context.

It also follows that trials of VDT services require no special safeguards. Indeed, the nature of trials is that they pose less threat to public interests than ongoing operations of any kind. Therefore, the current minimal rules applied to trials of enhanced services are more than adequate.

SBC strongly opposes the grant of a blanket waiver of 47 U.S.C. Section 533(b) to the entire telephone company industry. The more forthright and consistent course would be for the Commission to acknowledge that LECs have a choice created by the courts. Only then will the Commission see the growth in competitive video services which it has strived for more than three years to create.

Ideally, the end results of this undertaking will move the Commission a little closer to the realization that it fundamentally is in the business of regulatory services, not carriers, and that very little regulation of video service will be necessary once LECs are permitted to fully and freely enter the market.

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and	)	
Amendments of Parts 32, 36, 61, 64, and 69 of the Commission's Rules to Establish and Implement Regulatory Procedures for Video Dialtone Service	)	RM-8221

INITIAL COMMENTS OF SOUTHWESTERN BELL CORPORATION

Comes now Southwestern Bell Corporation ("SBC") and files these *Initial Comments,* on behalf of itself and its operating subsidiaries, in response to the Federal Communications Commission's ("FCC") *Fourth Further Notice of Proposed Rulemaking* ("4th FNPRM"), released January 20, 1995, herein.

I. INTRODUCTION

The fundamental purpose of this proceeding is to set new ground rules for competition in the video services market in the light of the recent and numerous court decisions upholding the local exchange carriers' ("LECs") right to provide video programming directly to subscribers in its telephone service area. The debate over whether telephone companies should be allowed to compete against entrenched providers of video services is over. Ironically, long before the courts rendered the statutory prohibition nugatory, this Commission recommended that Congress repeal the ban, precisely because of the benefits that strong competitors would bring. The LECs will not, indeed cannot, be the dominant provider of video services. They enter a relatively mature market with no market share and few, if any scale economies.

The plain fact is that the video dialtone ("VDT") scenario created by this Commission in 1992 has been rendered obsolete by the courts' unanimous rejection of the telco/cable cross-ownership restriction as unconstitutional. The VDT rules, including the incongruous and unwieldy Section 214 approval process, were designed to ensure that telephone companies had some meager role in video delivery <u>while not exceeding the severe limitations of the law</u>. The subsequent invalidation of the very law that inspired VDT's creation should cause the Commission to doubt the necessity of every part of the VDT structure that remains. Instead of looking for reasons to retain a scaffold which is no longer supporting the timbers, the FCC should dismember it and ask whether <u>any</u> regulation is required. Because of the fact that competition for video services already exists (DBS and wireless cable providers), SBC believes that the answer to the question is a resounding "no."

The tone and detail of the *4th FNPRM* would suggest that the Commission disagrees. The FCC appears to assume that the VDT structure merely requires fine tuning, which it seeks to accomplish by overlaying the common carrier aspects of VDT with the fundamentally inconsistent noncommon carrier Title VI. The judicial invalidation of the cross-ownership restriction gives LECs a <u>choice</u> of models under which to operate their video services. One model is the one created by the FCC--the VDT model--which would apply Title II common carrier regulation to the transport element but impose virtually <u>no</u> regulation on the content providers who purchase the transport services. The other model is the cable model which includes no common carrier requirements, by law, but applies Title VI requirements to the integrated product. These comments will address the questions asked by the FCC in the context of each model and demonstrate that only by clearly distinguishing each model will the Commission achieve its policy goals and stay clear of illegality.

The Commission considers in this proceeding whether to apply Title II (the common carrier portion of the Communications Act), Title VI (the cable services portion of the Communications Act), or both, to the provision of video services. The answer is either one or the other, but not both. Which one is selected is the choice of the provider, however, not the FCC, because the provider may choose whether to provide noncommon carrier cable services or common carrier video transport services. This choice by the provider drives the "choice" of regulation to be applied. *See* § III. B below.

The FCC has never found it necessary to apply both Title VI and Title II regulation to cable services, despite the fact that one can as easily perform the same mental gymnastics to separate cable service into a transport element. Nor has the Commission proposed that a cable company act as a "common carrier" for other programmers, despite the fact that the coaxial facility it controls is capable of providing many different programming selections for a single subscriber. To impose the rigors of two inconsistent but equally rigorous systems of regulation on a single carrier certainly would be antithetical to the FCC's overarching purpose of choosing competition over regulation to control a market. To impose them on one carrier seeking to enter the video market but not the entrenched incumbent would simply be unfair and clearly without statutory authority. Therefore, if the FCC imports Title VI into a Title II service, (or vice versa) that order will be arbitrary and capricious under the Administrative Procedures Act.

SBC contends that all companies have a choice of models under which to offer video services. If a company chooses to offer video transport under the VDT model, the video transport service can be regulated as a common carrier service under Title II of the Communications Act. The selection of video content supplied over those common carrier facilities, however, would not be regulated regardless of whether it is performed by a telephone company affiliate or an independent company. *See* § IV.A. *infra*.

On the other hand, a company may choose to operate within the cable model. In this model, it would be transporting its own video signals and would not operate under VDT rules. Regardless of whether video and telephony signals are carried over the same facility or different facilities, the transport of video signals is an integral part of the cable service but is <u>not</u> a common carrier service offered to the general public. Therefore, the transport <u>and</u> content (i.e., the cable service) would be subject to all the rigors of Title VI, but no VDT rules would apply. *See* § IV. C. *infra*.

The SBC dual-model approach has several advantages over the FCC's proposals. First, it is intellectually honest. The heart of common carrier regulation is an <u>intention</u> to offer service to the general public on a nondiscriminatory basis. Second, it provides to corporate enterprises like SBC, which are convinced that success in the video market requires service offerings comparable or superior to that of the cable alternative, an opportunity to compete head-to-head with these companies and to be regulated on a parity basis.

In addition to these advantages, the SBC approach provides an elegantly simpler answer to the intricate questions posed by the Commission's *4th FNPRM*. While SBC and its video and telecommunications services subsidiaries oppose numerous provisions of Title II and Title VI as applied by this Commission, the SBC approach would clearly and easily answer which provisions should apply and when.[1] SBC urges the Commission to recognize that LECs have a choice of models when resolving the issues herein.[2]

II. APPLICATION OF TITLE II TO VIDEO PROGRAMMING

A. Telephone Companies And Their Affiliates Should Be Permitted To Provide Programming Over Their Own Networks.

The first question posed by the *4th FNPRM* is whether VDT network providers[3] should be allowed to provide video programming over their own VDT

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[1]SBC does not intend to imply that the FCC may choose which type of regulation should be applied to video service provision. The law is relatively clear that SBC may choose to serve as a cable operator without any permission by the FCC. It will hasten the advent of significant competition in video services, however, if the FCC clearly enunciates the separate nature of VDT and cable service paths.

[2]If the Commission disagrees, it should recognize that the rules developed in this docket must apply to any cable company which enters the telephony business. Such companies would be required to offer video transport to any non-affiliated programmer and also would be subject to Title VI regulation.

[3]The FCC poses the question here and in most of the *4th FNPRM* in terms of LEC rights and responsibilities. SBC contends that this demonstrates a fatal flaw in the Commission's approach. Regulation should be applied on the basis of the services a company provides, not the "identity" of the company. The birth order of a company's set of service offerings should not affect the rules applied to them. Accordingly, when organizations which began life as cable companies or electric companies, for example,

platforms. The Commissioners themselves conclude that the FCC does not have the power to prevent such a use of the telco's own property, given the string of trial and appellate decisions which have held the so-called "telco/cable cross-ownership restriction" (47 U.S.C. § 533(b)(3)) unconstitutional on its face.[4] The Commission should confirm its tentative conclusion that VDT network providers (and their affiliates) are permitted by law to provide video programming over Title II video dialtone platforms. No governmental interest to support a ban exists, as these cases have held, because the public interest favors competition in the delivery of video services. Nothing has happened in the intervening years to change the wisdom of the Commission's 1991 recommendation[5] herein that Congress repeal 47 U.S.C. § 533(b) so that telephone companies can provide video competition. Any hypothetical governmental interest in preventing telco entry into this market is vastly outweighed by the urgency of introducing more vigorous competition. Moreover, the litigation has proven conclusively that a ban is not a "narrowly tailored" restriction of the telephone companies' First Amendment rights and therefore cannot prevail in the face of an unequivocal constitutional right.

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enter the telephony business, they may wish to offer video transport as a common carrier. If so, they too will be governed by the VDT rules, including any limitations on the rights of the affiliates to provide video programming over the same facilities used to transport telephony. *See, e.g., Separate Statement of Commissioner Andrew Barrett* at p. 3.

[4] *4th FNPRM* ¶ 8.

[5] *First Report and Order*, 7 F.C.C.R. 300, 306 ¶ 10 (1991), *aff'd, Memorandum Opinion and Order on Reconsideration*, 7 F.C.C.R. 5069 (1992) ("*First Recon. Order*"), *aff'd, NCTA v. FCC*, 33 F.3d 66 (D.C. Cir. 1994) ("*NCTA*").

B. <u>Video Programming Offered By Telephone Companies and Their Affiliates Should Not and Cannot Be Limited to VDT Arrangements</u>.

1. <u>Such A Limitation Is Contrary To The FCC's Purpose Of Encouraging Diversity In Programming</u>.

Not much more difficult is the Commission's second question concerning whether it should limit a LEC's provision of video services to those provided over its VDT network. Telephone company entry into video services is not entirely new to the FCC. As the *4th FNPRM* notes, telephone company affiliates were permitted under 47 U.S.C. § 533(b) to operate video service delivery systems outside their telephone service territory.[6] *4th FNPRM* ¶ 11. As the Commission also notes, LECs were permitted under the now defunct telco/cable cross-ownership restrictions to obtain waivers to own cable systems in their telephone service territory if "the provision of video programming directly to subscribers through a cable system demonstrably could not exist except through a cable system owned by...the common carrier involved." 47 U.S.C. § 613(b)(4). In both these instances, the public interest supported use of models other than the common carrier underpinnings of VDT for video service delivery.

Restricting telephone companies' provision of video services to programming over VDT networks will undermine the FCC's objectives in creating VDT.

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[6] Indeed, a SBC subsidiary, Southwestern Bell Media Ventures ("SBMV"), operates two cable television systems in Maryland and Virginia. Among other findings, the Montgomery County Commission approved this transfer of ownership as being "in the public interest" because of the resources SBMV brought to enrich and upgrade the services offered. *Settlement Agreement among SBMV Montgomery County, Maryland, and Montgomery Cablevision Limited Partnership*, dated October 15, 1993, p. 2. Obviously, these services are not being provided over a VDT platform.

The Commission has admitted that VDT is inferior to traditional cable provision from the view of the provider. "...[W]e also agree that under video dialtone, local telephone companies will not be on an equal footing with cable companies because they will be limited in the range of services they can offer in response to market demand." *Second Order on Reconsideration* herein, 7 F.C.C.R. 5781, 5850 ¶ 140 (1992).

Until the Commission permits anchor tenant arrangements or something similar, for example, VDT providers must find ways to interdict analog provision, require their programmer-customers to supply the means of interdiction, or warn the programmers that the system is incapable of preventing unauthorized use of analog channels. If the VDT provider encourages cooperation among the analog programmers to offer a single package of services, that very cooperation imposes transaction costs upon the VDT provider that a cable company will not suffer. The recent experience of Bell Atlantic in attempting to secure approval of VDT tariffs demonstrates that the regulatory hoops required to gain entrance to the video services via VDT platforms are immense.

The Commission has no record upon which to conclude that VDT can survive these handicaps, while the ability of cable companies to survive and flourish is obvious. Thus a Commission decision to limit telephone company provision of video programming to that offered over a VDT network would be arbitrary and capricious because it would be contrary to the FCC's stated policy of encouraging video alternatives to traditional cable providers.[7]

2. <u>The FCC Cannot Forbid A Telephone Company To Operate Cable Businesses In Favor Of Its Provision Of VDT Services Because To Do So Would Violate The Companies' First Amendment Rights</u>.

The FCC is without legal authority to require telephone companies to provide video programming only over video dialtone platforms. The recent litigation over the telco/cable cross-ownership restrictions[8] demonstrates that such a restriction would violate the companies' First Amendment rights. The statute which has been invalidated by five different courts[9] was designed to prohibit LECs from becoming traditional cable operators in-region.[10] If the Commission limits telephone company

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[7]*See Second Recon. Order* ¶ 48 *et seq.* SBC does not believe that the two-wire scenario is necessary in every location to achieve competition in video services. But obviously, the more incentive that is created for multiple facilities-based providers, the more likely it is that the incumbent video providers will feel real competitive pressure.

[8]To date, the following decisions have held 47 U.S.C. § 533(b) unconstitutional: *U S West, Inc. v. United States,* 1994 U.S. App. LEXIS 36775 (9th Cir. 1994); *Chesapeake & Potomac Tel. Co. v. United States,* 42 F.3d 181 (4th Cir. 1994); *United States Telephone Association v. United States, Slip Opinion, Final Order and Injunction,* Civil Action No. 1:94CV01961 (D.D.C. 1995); *Ameritech Corp. v. United States,* 867 F. Supp. 721 (N.D. Ill. 1994); *BellSouth Corp. v. United States,* 868 F. Supp 1335 (N.D. Ala. 1994).

[9]47 U.S.C. § 533(b).

[10]*See, e.g., 4th FNPRM* ¶ 3 (describing the Commission's cross-ownership restrictions as being concerned with telephone company provision of "cable television services" in their local areas and describing the 1984 Act as being modeled on it); *Second Report and Order* herein ¶ 17; *American Scholastic TV Programming Foundation v. FCC,* 1995 WL 50299, *5 (D.C. Cir. 1995): "...[W]e find sufficiently strong indications that Congress meant only to reach video programming via cable...," relying *inter alia* on the fact that the act displays a "singular focus on the regulation of cable systems" (*id.* *6) and on the legislative history, which makes clear that the Congress "wanted to ensure that nonvideo programming cable services would not be covered by the restriction of Section 533(b)." (emphasis supplied) *Id.* *7.

provision of video programming to the VDT model, however, it would be prohibiting a telephone company from operating as a cable operator and therefore would violate the numerous injunctions entered against the government to restrain enforcement of the invalid statute. The Commission may not revisit the issue the government has lost so many times by adopting rules which restrict telephone companies to the provision of video programming through video dialtone.

Even if the Commission concludes that it is not enjoined from limiting telephone provision of video programming to those services provided over a VDT platform, such a condition would impose yet another restriction on those companies' exercise of First Amendment rights. Like the video programming ban, the conditional permission would single out telephone companies and place a unique and substantial burden upon their speech. Moreover, because of the competitive disadvantage which this would place on the telephone companies as compared to their cable competitors, the burden would be particularly invidious. Cable companies are permitted to exercise virtually unlimited editorial control over the programming they carry. If limited to the VDT model, the editorial reach of telephone companies would be constrained to those few channels (perhaps less than one-quarter, if capacity use restrictions are adopted) which it is permitted to use. Such actions which single out a particular member or subset of the public "...place[ ] a heavy burden on the State to justify its action."[11] The proposed limitation on a telephone company's video opportunities would constitute an

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[11] *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592-93 (1983).

extraordinary and substantial burden on the exercise of its First Amendment rights. Therefore, no matter how laudable the Commission purpose in creating the common carrier option, it cannot limit telephone companies to that option without at least satisfying the "intermediate scrutiny" test developed in *United States v. O'Brien*, 391 U.S. 367 (1968).[12] The Supreme Court recently outlined the test when reviewing the "must carry" rules:

> When the government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.... [T]he Government still bears the burden of showing that the remedy it has adopted does not burden substantially more speed than is necessary to further the government's legitimate interests....(citations omitted).

Because the FCC has made no attempt to shore up the proposed limitation by describing the evil it is designed to prevent nor proven that the restriction is the least necessary to cure the evil, it is doomed to be constitutionally "dead on arrival."[13]

3. <u>47 U.S.C. § 214 Does Not Enable The Commission To Limit Telco Provision Of Video To VDT Arrangements</u>.

The Commission is simply in error when it concludes that it has authority under 47 U.S.C. § 214 "...to require LECs that seek to provide video services directly to

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[12]The Commission cannot justify such an intrusion on free speech simply by referring to the "desirability" of a common carrier option. Rather, it must show that <u>no other</u> option will prevent a substantial harm to the public. *Turner Broadcasting System v. FCC*, 114 S. Ct. 2445, 2470 (1994).

[13]*Id.*

subscribers in their telephone service areas to do so on a video dialtone common carrier platform and not on a non-common carrier cable television facility." *4th FNPRM*, ¶ 13. This statutory provision gives the FCC authority to determine whether the "construction of a new line or of an extension of any line..." by a <u>common carrier</u>[14] will serve the "present or future public convenience and necessity."[15] What the Commission misses, however, is the limitation of this power to approval of the construction of <u>common carrier</u> facilities. "An examination of the common law reveals that the primary *sine qua non* of common carrier status is a *quasi-public character*, which arises out of the undertaking to carry for all people indifferently." *NARUC v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976) ("*NARUC II*").[16]

The statute does not apply to the construction of private networks nor to the construction of cable television facilities, the latter being subject to a different set of public interest standards. "Since it is clearly possible for a given entity to carry on many types of activities, it is at least logical to conclude that one can be a common carrier with

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[14]Although the statute uses the term "carrier," that word is defined elsewhere as "common" carrier. 47 U.S.C. § 153(h).

[15]The D.C. Circuit Court of Appeals recently remarked, "All of the described regulation of tariffs under Title II, [including § 214 requirements] however, hinges upon the premise that the regulated entity is a common carrier." *SWBT v. FCC*, 19 F.3d 14 75, 1480 ("*Dark Fiber Case*") (D.C. Cir. 1994).

[16]*Cf NARUC v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976) ("*NARUC I*") - "[T]o be a common carrier one must <u>hold oneself out</u> indiscriminately to the clientele one is suited to serve...." (emphasis supplied).

regard to some activities but not others."[17] "Whether an entity in a given case is to be considered a common carrier or a private carrier turns on the particular practice under surveillance...."[18] It stands to reason, therefore, that a company which chooses not to offer video transport service to the public is not subject to Section 214 approval. The FCC is required by the First Amendment to permit a telephone company to provide video services to end-users, but the FCC cannot force a company to offer any specific service (*e.g.*, video transport) to the public.[19] Therefore, 47 U.S.C. § 214 does not confer upon the FCC authority to limit telco entry into video services upon the offer of video transport services and the interested public on a common carrier basis.

In other words, only if a company seeks to provide transport services to multiple video information providers will Section 214 apply. *See, e.g., General Tel. Co. of Southwest v. FCC,* 449 F.2d 846 (5th Cir. 1971). If, on the other hand, the company intends to use its video transport facilities only to provide end-user video services, the service provided is not common carriage and thus cannot be regulated under Title II.[20]

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[17]*NARUC II, p. 608. See also MCI Telecommunications Corp. v. FCC,* 765 F.2d 1186, 1188 (D.C. Cir. 1985); *CCIA v. FCC,* 693 F.2d 198, 211 (D.C. Cir. 1982), *cert. denied,* 461 U.S. 938 (1993).

[18]*Dark Fiber Case, supra,* p. 1481 (citations omitted).

[19]*Id.*, p. 1480 .

[20]"The term 'cable system'...does not include...a facility of a common carrier which is subject, in whole or in part, to the provisions of subchapter II of this chapter, except that such facility shall be considered a cable system (other than for purposes of section 541(c) of this title) to the extent such facility is used in the transmission of video programming directly to subscribers...." 47 U.S.C. § 522(7)(c). *See also Further Notice of Proposed Rulemaking, First Report and Order and Second Further Notice of Inquiry,* CC Docket 91-334, 7 F.C.C. R. 300, 327 (1991) (hereinafter "*First Report*"). But, as reasoned below, Title VI's counterpart to Section 214 would apply, as well as the other sections pertaining

III. TITLE VI DOES NOT APPLY TO VIDEO PROGRAMMING PROVIDED OVER A VDT PLATFORM.

A. The Video Transporter In A VDT Arrangement Is Not A Cable Operator And A VDT System Is Not A Cable System.

The Commission inquires whether a LEC or its affiliate which provides video programming over the LEC's VDT system (i.e., the VDT model) and actively engages in the selection and distribution of such programming is subject to Title VI of the Communications Act as a "cable operator."[21] This inquiry plows old ground. The analysis of the Commission in 1992, upheld by the Court of Appeals for the District of Columbia in *NCTA v. FCC*, 33 F.3d. 66 (1994), will work equally well at this juncture. The heart of the Commission's analysis then was that video dialtone "...separate[s] control over the creation, selection, and ownership of video programming from control over the facilities linking the program supplier and each of its individual viewers...."[22] Regardless of the affiliation of the video transporter and the programmer, the video transporter in a VDT arrangement is not providing cable service and is not acting as a cable operator. Rather, the video transporter is acting as a common carrier and, therefore, its video transport facilities are expressly exempt from "cable" regulation, pursuant to 47 U.S.C. § 522(7)(C).

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to cable services.

[21]*4th FNPRM* ¶ 14. Again, the Commission's question assumes without proof that LEC affiliation with a video services programmer presents a special case, one that differs from other relationships of programmers. SBC contends that the question should be whether any programming provided over a VDT network is subject to Title VI.

[22]*First Reconsideration Order, supra*, CC Docket No. 87-266 ¶ 10.

Because the video transporter in the VDT model does not make the programming compilation decision, the transporter also does not "transmit" video programming. As the Commission found in 1992 (and the Court of Appeals agreed), "transmission" for such purposes requires "...active participation in the selection and distribution of video programming."[23] The common carrier transporter does not participate in that selection. Rather, it is transporting video signals to the programmer, which in turn will compile the programs for delivery to the subscriber.[24]

Additionally, the LEC operating the VDT network is not subject to Title VI regulation because a VDT system is not a "cable system." This term is defined as "a set of closed transmission paths and associated...equipment." 47 U.S.C. § 522(4)(A). As the Commission reasoned previously, the facilities of a VDT network are common carrier facilities subject to Title II regulation and "...governed by common carrier regulations that incorporate the same concerns about public safety and convenience and use of public rights-of-way that provide a key justification for the cable franchise requirement."[25] The fact that the video transporter may now also provide the content does not affect this analysis. Thus application of Title VI regulation would be either redundant or inconsistent. *Id.* Title VI regulation cannot apply to a VDT operator because Title VI by its terms cannot apply to a common carrier arrangement. *See* 47 U.S.C. §§ 522 (7)(C), 541. Clearly, Congress intended for either Title II or Title VI, but

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[23]*First Reconsideration Order, supra* ¶ 16, *NCTA v. FCC.*, 33 F.3d 66, 73 (1994).

[24]*Id.* ¶ 24.

[25]*First Reconsideration Order, supra* ¶ 22. This rationale was upheld on appeal. *NCTA v. FCC, supra*, p. 73.

not both, to apply to video transporters, since 47 U.S.C. § 541(c) exempts "cable systems" from regulation "as a common carrier or utility," i.e., as a telephone company under Title II.[26] Congress further emphasized the "either/or" nature of Title II and Title VI when it provided in 47 U.S.C. § 544(f)(1) that "[a]ny Federal Agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in this subchapter (emphasis supplied)." The Commission cannot change this duality simply because LECs are now permitted to provide video programming.

B. The Programmer Using A VDT Network Is Not A Cable Operator.

The fact that the programmer-customer of a VDT network now may be affiliated with the VDT network operator does not change any of the exhaustive analysis performed by this Commission previously and upheld on appeal. The functions of transport and program selection are still separate, the public issues related to construction are still analyzed in an FCC filing and the transport facilities still are available for use by unaffiliated providers. The role of the programmer which purchases video transport on a VDT network has not changed merely because that programmer now can be affiliated with a local exchange telephone company. Its role is still that of compiler of programming and not that of operator of facilities. Therefore, just as in

[26]SBC does not wish to escape all regulation of video services, though it certainly believes that this should be the natural consequence of active competition in that market. Rather, SBC seeks to facilitate this Commission's goal stated nearly three years ago to avoid "...the duplicative regulation that would occur if we were to find that a cable franchise is also required for video dialtone facilities." *First Reconsideration Order, supra* ¶ 22.